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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

STEPHEN M. TREZZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a split among the Circuit Courts of Appeal be resolved?

2. Is a final judgment of the District of Arizona, in a civil action, denying a motion pursuant to Rule 41(g), Fed. R. Crim. P., appealable to the Ninth Circuit Court of Appeals?

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ORDERS BELOW

On April 6, 2007, the Ninth Circuit issued an unpublished Order dismissing Stephen M. Trezza's (Trezza's) appeal for lack of jurisdiction (App. A). The unpublished Opinion of the District Court filed October 18, 2006 is reproduced as App. B and the Report and Recommendation of the Magistrate is App. D. The final judgment entered by the clerk of the District Court, upon the order of the District Court, is App. C.

JURISDICTION

The Ninth Circuit denied Trezza's Petition for Rehearing and Suggestion for Rehearing *En Banc* on May 23, 2007 (App. E). The Supreme Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The applicable statutory provisions and rules, verbatim, with appropriate citation.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291.

> Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Rule 41(g), Fed. R. Crim. P.

STATEMENT OF THE CASE

This appeal stems from the issuance and execution of two search warrants. The first search warrant was executed at Trezza's law firm's office building. The second search warrant was executed at storage units rented by Trezza's law firm.

Trezza filed a motion in the District Court pursuant to Rule 41(g), Fed. R. Crim. P., for the return of property seized pursuant to the search warrants. Trezza argued, for several reasons, that the search warrants were unlawfully issued and/or executed. Trezza's primary arguments were that the search warrants were unlawful pursuant to *Franks v. Delaware*, 438 U.S. 1545 (1978), and that the "taint team" or "Chinese wall" procedure employed by the government in executing the search warrants was unlawful on its face and, in any event, not followed.

After Trezza's motion was fully briefed, oral argument was held. Following oral argument, United States Magistrate Judge Charles R. Pyle assigned a civil case number to the case and Trezza was ordered to pay the civil filing fee. Magistrate Judge Pyle issued a Report and Recommendation (R & R) that the case be dismissed because the remedy sought by Trezza was too broad. App. D, pgs. 19a-20a. In his R & R, Magistrate Judge Pyle did not deny jurisdiction over Trezza's motion. App. D, pg. 20a.

Following Trezza's timely objection to Magistrate Judge Pyle's R & R, District Judge David Bury expressly "accepted and adopted" the findings and conclusions in Magistrate Judge Pyle's R & R, dismissed the civil action, and ordered that judgment be entered thereon. App. B. Final Judgment in the civil action was entered in the District Court on October 16, 2006. App. C.

On October 19, 2006, Trezza timely filed a Notice of Appeal from the District Court's final judgment. After Trezza timely filed his Opening Brief with the Ninth Circuit, the government filed a sealed motion to dismiss Trezza's appeal for lack of jurisdiction.

On April 6, 2007, the Ninth Circuit granted the government's motion to dismiss Trezza's appeal for lack of jurisdiction. App. A. Trezza then filed a Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*. The Ninth Circuit denied that petition on May 23, 2007, and reaffirmed its conclusion that appellate jurisdiction does not exist over motions for return of property when there is an ongoing grand jury investigation, citing *Andersen v. United States*, 298 F.3d 804, 808 (9th Cir. 2002). App. E.

In short, this case concerns whether the District Court's October 16, 2006, final judgment is appealable. Neither the Ninth Circuit nor the government can point to any authority that a final judgment, entered in a civil case, is not appealable. The judgment of the Ninth Circuit should be vacated and this matter should be remanded to the Ninth Circuit so that it can hear Trezza's appeal on its merits.

REASONS FOR GRANTING THE PETITION

This Court should grant Trezza's Petition for Certiorari for five reasons.

First, a conflict exists between the Circuit Courts on the issue of the appealability of rulings on motions for return of property when no information or indictment is pending, but there is an ongoing grand jury investigation. The 6th, 7th, 8th, and 10th Circuits allow appeals from rulings on motions for return of property when no information or indictment is pending. *See Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982); *Matter of 949 Erie Street, Racine, Wis.*, 824 F.2d 538 (7th Cir. 1987); *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983); *National Bank of Tulsa v. United States Department of Justice*, 865 F.2d 217 (10th Cir. 1989). The remaining Circuit Courts of Appeal follow *Andersen* and do not allow appeals in such cases.

The split in the Circuit Courts stems from ambiguity in this Court's decisions on this issue. In *DiBella v. United States*, 369 U.S. 121, 131-32, 82 S.Ct. 654, 660-61, 7 L.Ed.2d 614 (1962), this Court held that the denial of a motion to return property brought when no indictment is pending is appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution

in esse against the movant." Some Circuits have interpreted the phrase "prosecution in esse" broadly—to include ongoing grand jury investigations. Other Circuits have interpreted that phrase more narrowly and held that the denial of such motions is not appealable only if the movant has had an indictment or information filed against them.

Another example of how the issue of the appealability of pre-indictment motions to return property is muddled exists in the District of Columbia Circuit (the D.C. Circuit). Specifically, in *United States v. Rayburn House Office Building, Room 2113, Washington, DC*, __ F.3d __, 2007 WL 2275237 (D.C. Cir. 2007), United States Representative William Jefferson appealed the denial of his motion for return of property, despite being under grand jury investigation. On June 4, 2007, Rep. Jefferson was indicted for certain crimes. Yet his appeal continues. Since Rep. Jefferson's indictment, the D.C. Circuit has issued an opinion and addressed the merits of Rep. Jefferson's Rule 41(g) claims, all in a case in which no final judgment was entered. Since Rep. Jefferson is now under indictment, the D.C. Circuit's actions clearly contravene *DiBella*.

Second, this Court should correct the error of the Ninth Circuit. The Ninth Circuit's ruling that it has no jurisdiction over Trezza's appeal improperly creates a new form of final civil judgment that is not appealable. This is contrary to law. The law in this area could not be clearer: 28 U.S.C. § 1291 states that "[t]he courts of appeals . . . shall have jurisdiction

of appeals from all final decisions of the district courts of the United States. . . ." This rule is called the final judgment rule. *See, e.g., Williamson v. UNUM Life Ins. Co. of America*, 160 F.3d 1247, 1249 (9th Cir. 1998) ("The final judgment rule, which is embodied in 28 U.S.C. § 1291, empowers circuit courts to hear appeals from all final judgments issued by the district courts.").

The government conceded below that this is a civil case. The law is clear that motions filed pursuant to Rule 41(g), Fed. R. Crim. P., properly can be brought when no indictment or information is pending. *See, e.g., United States v. Martinson*, 809 F.2d 1364, 1366-67 (9th Cir. 1987). When a Rule 41(g) motion is filed and no indictment or information is pending, the motion is treated as a civil, equitable complaint. *See Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993). Magistrate Judge Pyle recognized this when he assigned this matter a civil case number and ordered Trezza to pay the District Court's civil case filing fee. District Judge Bury recognized this fact when he ordered the District Court Clerk to enter a final civil judgment on his October 16, 2006, Order. The District Court's October 16, 2006, judgment was a final judgment in a civil case.

This reason is sufficient alone to warrant this Court to grant Trezza's Petition for Certiorari. When a final judgment is entered in a civil case, the law provides that that judgment can be appealed.

Third, Trezza's Petition for Certiorari should be granted is because this case must be distinguished from the case cited by the Ninth Circuit in dismissing Trezza's appeal for lack of jurisdiction. The case cited by the Ninth Circuit in dismissing Trezza's appeal for lack of jurisdiction,

Andersen v. United States, 298 F.3d 804, 808 (9th Cir. 2002), was not a case in which a final civil judgment was entered. Accordingly, *Andersen*, and all such cases in which a final civil judgment was not entered, are inapposite to this case.

A court's entry of a final judgment in a civil case is not a mere administrative act. In its motion to dismiss, the government argued that the District Court's entry of final judgment did not confer the Ninth Circuit with jurisdiction over Trezza's appeal pursuant to 28 U.S.C. § 1291. The government argued that to allow Trezza's appeal to proceed based on the entry of the final civil judgment was to elevate form over substance regarding appealability and violate *Andersen*'s rule. This argument must be rejected. Such reasoning would require a finding that Judge Bury's October 16, 2006, final civil judgment was somehow a "lesser form" of judgment that is not appealable. No such type of judgment exists. Final civil judgments always are appealable.

Any argument that Trezza's appeal is an interlocutory appeal must also be rejected. The government's investigation of Trezza and his law firm has been ongoing for more than two years. The government stated in its pleadings that Trezza and his law firm may never be indicted for any crime. Indeed, the government relied on that assertion in support of its argument that Trezza would suffer no irreparable harm if the District Court denied jurisdiction over Trezza's Rule 41(g) motion.

District Judge Bury's October 16, 2006, judgment was a final civil judgment. There are no further proceedings to be held in this case and there is nothing left for the District Court or the parties to do. Trezza's appeal is not an interlocutory appeal.

If this Court finds that *Andersen* and its rule that "rulings on motions for return of property are unappealable when there is an ongoing grand jury investigation" does apply to this case, a fourth reason nonetheless exists for granting Trezza's Petition for Certiorari.

The fourth reason Trezza's Petition for Certiorari should be granted is because the Ninth Circuit's decision in this case even conflicts with another Ninth Circuit case: *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006). (This case arose out of the federal investigation of the Bay Area Lab Cooperative ("Balco") and its alleged distribution of illegal steroids to professional baseball athletes.)

Comprehensive Drug Testing involved three consolidated cases. Two of the cases were appeals brought by the government after the District of Nevada and the Central District of California granted motions to return property brought pursuant to Rule 41(g). At issue in the case was "whether the United States may retain evidence it seized . . . as part of an *ongoing grand jury investigation*. . . ." *Comprehensive Drug Testing*, 473 F.3d at 919 (emphasis added).

The Ninth Circuit in *Comprehensive Drug Testing* did analyze the appealability of the rulings on the Rule 41(g) motions. However, its analysis was limited solely to the threshold issues of standing and whether the government's appeal was timely. The Ninth Circuit did not find in *Comprehensive Drug Testing*—as it did in this case—that rulings on motions for return of property are not appealable when there is an ongoing grand jury investigation. After discussing standing and timeliness, the Ninth Circuit in

Comprehensive Drug Testing decided the merits of the government's appeal with regard to the Rule 41(g) motion.

This split between and within Circuits needs to be resolved. This Court should grant Trezza's petition so that the appealability issue can be fully briefed and the conflict between and within the Circuits conclusively settled.

Fifth, Trezza's appeal raises an important federal question on when District Courts are required to hold evidentiary hearings on motions brought pursuant to Rule 41(g), Fed. R. Crim. P.

Rule 41(g) states:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. . . . ***The court must receive evidence on any factual issue necessary to decide the motion.*** If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(Emphasis added.)

Rule 41(g) directs Courts to hold evidentiary hearings when factual disputes are raised regarding the lawfulness of the search and seizure of property. Trezza raised factual disputes in the District Court. In support of his Rule 41(g) motion, Trezza submitted to the District Court eighteen different exhibits, including seven sworn declarations of witnesses that controverted statements made in the affidavit

for issuance of the search warrants. Despite raising factual disputes, the District Court refused to hold an evidentiary hearing on Trezza's motion. The issue of when a hearing must be held on Rule 41(g) motions for return of property needs to be resolved.

Failure to grant Trezza's Petition for Certiorari will leave him with no remedy for the unlawful seizure of his property and will have the effect of negating Rule 41(g) for Trezza. Trezza will have been denied a hearing on his motion and the opportunity to have the merits of his appeal from that denial heard by any court.

CONCLUSION

This is a simple case. Trezza appealed from a final judgment in a civil case. The Ninth Circuit ruled that no jurisdiction exists over Trezza's appeal. The Ninth Circuit's decision is contrary to the final judgment rule and warrants this Court granting Trezza's Petition for Certiorari. Even if this Court concludes that the final judgment rule does not apply here, there is conflict amongst the courts of appeal on whether rulings on motions for the return of property are appealable when there is an ongoing grand jury investigation that must be resolved. Moreover, conflict exists between the Ninth Circuit's own decisions on the issue of appealability.

Because this case presents a straightforward issue, Trezza requests that his Petition for Certiorari be granted and that this Court remand this matter to the Ninth Circuit with an Order that the Ninth Circuit reinstate Trezza's appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 6, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-16959

D.C. No. CV-06-492-DCB
District of Arizona,
Tucson

STEPHEN M. TREZZA,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

ORDER

Before: O' SCANNLAIN, GRABER and BEA, Circuit Judges.

Appellee's opposed motion to dismiss this appeal for lack of jurisdiction is granted. *See Andersen v. United States*, 298 F.3d 804, 808 (9th Cir. 2002) ("In this circuit, rulings on motions for return of property are unappealable when there is an ongoing grand jury investigation.").

DISMISSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED OCTOBER 16, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CV 06-492 TUC DCB

Stephen M. Trezza,

Plaintiff,

v.

United States of America,

Defendant.

ORDER

The Motion for Return of Property, pursuant to Rule 41(g), is denied for lack of jurisdiction. The Motion to Disqualify Counsel because they will be witnesses at the Rule 41(g) hearing is denied. The Government's motions to quash subpoenas issued by Mr. Trezza for witnesses at the Rule 41(g) hearing are granted.

On November 2, 2005, Mr. Trezza's law office and law office storage area was searched and documents were seized, pursuant to a search warrant related to an Internal Revenue Service (IRS) investigation. The search was conducted by a taint team of investigators and lawyers not associated with the criminal investigation of Mr. Trezza.

Appendix B

On June 16, 2006, Mr. Trezza filed a Motion for Franks Hearing and Motion for Return of Property. The Motion for Franks Hearing has been dismissed as premature. *See* (Order signed by this Court on September 14, 2006, affirming order by Magistrate Judge Pyle)). On September 21, 2006, Judge Pyle issued an Order explaining that the Motion for Return of Property, pursuant to Rule 41(g), was a civil equitable proceeding because there was no related pending criminal proceeding. Accordingly, Mr. Trezza needed to pay the requisite filing fee to open a civil case, which he did, and a civil case was opened by the Clerk of the Court on September 21, 2006. The civil case was assigned to this Court given its relationship to the Motion for Franks Hearing, which had been randomly assigned to this Court for purposes of allowing Mr. Trezza to appeal Magistrate Judge Pyle's ruling on it. Also on September 21, 2006, Judge Pyle issued a Report and Recommendation that this Court not exercise jurisdiction over the Rule 41(g) motion.

Because this case proceeds in equity, pursuant to 28 U.S.C. § 636(b)(1) and LR Civ. 72, this Court *nunc pro tunc*[1] refers it to Magistrate Judge Pyle for the Report and Recommendation.

---

1. This Court notes for the record that Mr. Trezza argued for the Magistrate Judge to exercise jurisdiction over the Rule 41(g) motion, conduct an evidentiary hearing, and issue a ruling. Essentially, Mr. Trezza suggested that Magistrate Judge Pyle act in accordance to 28 U.S.C. § 636, which requires this Court to *nunc pro tunc* refer the Motion for Return of Property for the Report and Recommendation issued on September 21, 2006.

Appendix B

28 U.S.C. § 636: Report and Recommendation

After a full and independent review of the record, the Magistrate Judge's Report and Recommendation is accepted and adopted as the findings of fact and conclusions of law of this Court. Pursuant to 28 U.S.C. § 636(b), the parties had ten days to file written objections to the R & R. Mr. Trezza filed objections. The Government has responded. Any objections that have not been raised are waived and will not be addressed by the Court. *See* 28 U.S.C. § 636(b)(objections are waived if they are not filed within ten days of service of the R & R).

Mr. Trezza objects to the Magistrate Judge's exercise of jurisdiction over the Rule 41(g) motion because he ruled without conducting an evidentiary hearing, thereby making a dispositive ruling in violation of the prohibition for such determinations contained in 28 U.S.C. § 636(b)(1)(A). To the extent that Mr. Trezza argued that a Magistrate Judge must always hold a hearing before issuing a Report and Recommendation, Mr. Trezza is wrong. As he noted in his Supplemental Hearing Brief filed on September 11, 2006: "Evidentiary hearings are required only when a movant alleges facts that are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim is presented. When a motion alleges facts which, if proven, will require a grant of relief, an evidentiary hearing will be set." (Supplemental Brief at 2 (citing *In the Matter of the Search of the Scranton Housing Authority*, 436 F.Supp.2d 714, 720 (Pa.2006)). This Court agrees with the Magistrate Judge that Mr. Trezza failed to alleged a factual dispute relevant to this Court's exercise of its jurisdiction,

therefore, no hearing was required. The Magistrate Judge did not issue a dispositive ruling; he issued a Report and Recommendation. The Rule 41(g) motion remains pending before this Court, and is disposed of by this Court after *de novo review.*

Return of Property: Rule 41(g)

First and foremost, entertaining Mr. Trezza's motion is an exercise of the Court's equitable jurisdiction which it undertakes with caution and restraint, and according to equitable principles. *Ramsden v. United States*, 2 F.3d 322. 324 (9th Cir.1993) (citing *Kitty's East v. United States*, 905 F.2d 1367, 1370 (10th Cir.1990)). The equities must be balanced between the Plaintiff and Government's needs for the seized property. There must be a danger of irreparable injury to the movant, stemming from waiting for a remedy rather than from the original seizure, and the movant must have no adequate remedy at law. In the Ninth Circuit the following factors are considered: 1) whether the Government displayed a callous disregard for the constitutional rights of the movant; 2) whether the movant has an individual interest in and need for the property he wants returned, 3) whether the movant would be irreparably injured by denying return of the property, and 4) whether the movant has an adequate remedy at law for the redress of his grievance. *Id.* at 325 (citing *Richey v. Smith*, 515 F.2d 1239, 1243-44 (5th Cir.1975)).

Appendix B

1. Callous Disregard

Here, Mr. Trezza alleges that the Government displayed a callous disregard for his constitutional rights. According to Mr. Trezza, 18 exhibits, including seven declarations from former employees of Trezza and his law firm, reflect that Agent Watson knowingly or recklessly submitted false information to Magistrate Judge Pyle as part of Agent Watson's application for the search warrants. Mr. Trezza argues that these exhibits raise material issues of fact as to whether the search and seizure was lawful. The Court has reviewed the exhibits and finds that the declarants only assert the statements in Agent Watson's application were "false, incomplete, and taken out of context." (Motion at Ex. B-L.) None of the declarations assert that he knowingly made such statements. Neither were the statements reckless. It is quite clear from reading the application that Agent Watson relied on three witnesses, Myra Bradway, Cheryl Cayce, and Shannon Bradley, which he deemed to be credible after he verified their employment with Mr. Trezza and that they had no criminal records. Several of the declarations include statements regarding Myra Bradway's vindictiveness towards Mr. Trezza and assert that she would have lied to a federal agent to ruin Mr. Trezza's life. See eg., (Motion at Ex. B and C.)

The evidence put forward by Mr. Trezza does not support his allegations that the Government acted with callous disregard for his constitutional rights when it secured the search warrant, which authorized the search and seizure of documents at Mr. Trezza's law offices.

Appendix B

2. Individual Interest in and Need for the Property

The Plaintiff does not express a need for access to any of the seized documents. "Trezza concedes that documents the taint team determined to be privileged have been returned to him and presumably no copies of those documents have been retained by the Government. The remaining documents have been copied with Trezza being supplied the copies and the Government retaining the originals." (Report and Recommendation at 2.) He does not argue that he needs to possess the originals nor that the copies will not suffice.

3. Irreparable Injury

Stigma resulting from being a target of a criminal investigation does not constitute irreparable harm. *Ramsden*, 2 F.3d at 326; *In re Search of Law Office*, 341 F.3d 404, 415 (5th Cir.2003). Plaintiff makes no argument of irreparable harm related to not possessing the original documents.

4. Adequate Remedy at Law

When a plaintiff faces criminal charges in the near future, he has an adequate remedy at law. *Angel-Torres v. United States*, 712 F.2d 717, 718-19 (1st Cir.1983). If criminal charges are filed against the Plaintiff, he may challenge the constitutionality of the search warrant during those proceedings; if charges are not forthcoming, he may reapply to this Court for the return of his property. *Id.* The Court notes that the Government argued for the speedy disposition of these pre-indictment motions because until resolved they

impede the investigation[2] and the statute of limitation runs for one of the tax years under investigation on April 15, 2007. *See* (Government's Response to Motion for Extension of Time, filed August 9, 2006, at 2.) Accordingly, charges should be forthcoming.

Conclusion

Based on the foregoing, this Court agrees with the Magistrate Judge's recommendation that this Court decline to exercise jurisdiction over this case. The Court affirms the Magistrate Judge's denial of the Rule 41(g) motion for lack of jurisdiction.

Plaintiff makes much of the Magistrate Judge's discussion of the merits of this case. Lacking jurisdiction, this Court will not engage in such discussion, but does note its agreement with the Magistrate Judge's following conclusions.

"The relief requested by Trezza is that all original documents seized be returned to him and that the Government retain no copies of the documents. This is tantamount to a pre-indictment motion to suppress." (Report and Recommendation at 2.)

"As importantly, Trezza insists on his right to an evidentiary hearing and the civil discovery procedures in

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2. Pending resolution of the Rule 41(g) motion, the seized documents have not been disclosed to the investigating agent. (Government's Response to Motion for Extension of Time at 2.)

advance of the hearing. This is tantamount to extraordinary pre-indictment discovery of the Government's investigation." *Id.* at 2-3.

Rule 41(g) was never intended to be a statutory expansion of the exclusionary rule. *Id.* at 3 (citations omitted). Even in *Ramsden*, where the Court found that a search and seizure conducted *without a search warrant* was callous disregard of the Plaintiff's constitutional rights, it let the government keep a copy of the seized documents to use in its investigation. Mr. Trezza makes no case for returning his property beyond what has already been returned by the Government.

Accordingly,

IT IS ORDERED that *nunc pro tunc* this case is referred, pursuant to 28 U.S.C. 636, to Magistrate Judge Pyle for a Report and Recommendation.

IT IS FURTHER ORDERED that a Report and Recommendation having been filed on September 21, 2006, objections having been filed, and after a full and independent review of the record, including all of the documents and exhibits presented to Magistrate Judge Pyle, his Report and Recommendation is accepted and adopted as the findings of fact and conclusions of law of this Court.

IT IS FURTHER ORDERED that the Motion for Return of Property / Motion to Suppress (document 2) is denied for lack of jurisdiction.

Appendix B

IT IS FURTHER ORDERED that this action is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that all pending motions to quash (documents 16, 19, 20, 22, 39, and 40) are DENIED.

IT IS FURTHER ORDERED that the Motion to Disqualify Counsel (document 23) is DENIED.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter Judgment accordingly.

DATED this 16th day of October, 2006.

s/ David C. Bury
David C. Bury
United States District Judge

APPENDIX C — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED OCTOBER 16, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CV-06-492-TUC-DCB

Stephen M. Trezza,

Plaintiff,

vs.

United States of America,

Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Return of Property/Motion to Suppress is DENIED for lack of jurisdiction.

IT IS FURTHER ORDERED that this case is DISMISSED without prejudice.

October 16, 2006
Date

RICHARD H. WEARE
CLERK

s/ Cathy Schwader
(By) Cathy Schwader, Deputy Clerk

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED SEPTEMBER 21, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CV 06-00492-TUC-DCB [CRP]

In Re: The Matter of The Search of: 4011 East Broadway Boulevard, Suite 101, Tucson, Arizona, 85711.

In Re: The Matter of The Search of: 201 South Plumer Avenue, Units #208, #249, and #310, Tucson, Arizona, 85719

REPORT AND RECOMMENDATION

These consolidated matters are before the Court because Mr. Trezza has filed a Motion For Return of Property seized pursuant to search warrants issued by this Court. For the reasons discussed herein, this Court recommends that the District Judge, after his independent review and consideration, deny the motion and order the case to be dismissed without prejudice.

On November 2, 2005, this Court issued search warrants to search Mr. Trezza's law office and the law office's storage locker for records related to an Internal Revenue Service ["iRS"] investigation. The search was conducted by a taint team of investigators and lawyers not associated with the investigation of Mr. Trezza. The documents seized have since been maintained in a secure facility in Phoenix. Agent Watson and Assistant U.S. Attorney Eric Markovich, who are in

charge of the investigation of Mr. Trezza, have not had access to these documents to date.[1]

On June 16, 2006, Mr. Trezza filed a Motion For *Franks* Hearing and Motion For Return of Property [hereafter "Motion"]. The Court, *sua sponte*, dismissed the Motion for *Franks* hearing as premature[2] and set the Motion for Return of Property for hearing.

Trezza requested an evidentiary hearing and served subpoenas duces tecum on IRS Agent Watson and several other witnesses for purposes of deposing the witnesses and obtaining the documents in advance of the evidentiary hearing. At the request of the Government, the Court stayed the subpoenas.

Trezza also moved to disqualify AUSA's Richard Mesh and Eric Markovich. Trezza argues that a grand jury subpoena specifically requested documents that had not been seized in the search conducted in November 2005. Trezza concludes that there had to be communications between the taint team and the investigatory team for that to occur. Mr. Mesh is the AUSA assigned to the taint team. Trezza argues Mesh and

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1. The Government is concerned about the speedy resolution of this motion because the statute of limitations will run in April 2007.

2. The dismissal of the Motion For *Franks* Hearing, a dispositive ruling, should have been done by Report and Recommendation. In any event, Mr. Trezza filed "objections" to that order, as would be done with a Report and Recommendation and ultimately, the denial of the Motion For *Frank* Hearing was upheld by District Judge Bury.

Markovich would be witnesses at the Rule 41(g) evidentiary hearing.

Three motions are before the Court: the motion for return of the seized documents; the motion to disqualify Mesh and Markovich; and the motion to quash the subpoena duces tecum. Whether Trezza is entitled to an evidentiary hearing on the Rule 41(g) motion is determinative of all three motions.

Trezza concedes that documents the taint team determined to be privileged have been returned to him and presumably no copies of those documents have been retained by the Government. The remaining documents have been copied with Trezza being supplied the copies and the Government retaining the originals.

The seized documents have not been delivered to the investigatory team pending this motion. Trezza has been requested to identify any additional privileged documents to be returned to him. Trezza refuses to do so, arguing that no statute or court order requires him to do so.

The relief requested by Trezza is that all original documents seized be returned to him and that the Government retain no copies of the documents. This is tantamount to a pre-indictment motion to suppress.

As importantly, Trezza insists on his right to an evidentiary hearing and the civil discovery procedures in advance of the hearing. This is tantamount to extraordinary indictment discovery of the Government's investigation.

Appendix D

Trezza argues that he can show that the Government's actions in obtaining the search warrants have been so outrageous that the Court will conclude the extraordinary remedy of suppression of all the evidence seized is required.

The current provision of Rule 41(g), Rules of Criminal Procedure, directs the court to balance the interests of the individual in recovering the use of the property seized and the Government's interest in investigating unlawful conduct. Trezza does not seek an accommodation of those two interests. Rather, he seeks the suppression of the use of any of this evidence in future court proceedings. While that may have been the appropriate remedy under the former version of this provision of Rule 41, it no longer is.

In 1989, Rule 41(g)[3] was amended in three respects. First, the language "or by the deprivation of property" was added to the first sentence to make clear that the movant need not establish an unlawful search to request the return of property no longer needed for the government's investigation.

Secondly, the following language was struck from Rule 41(g):

> If the motion is granted, the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

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3. At the time, motions for return of property were provided for in Rule 41(e), since renumbered to Rule 41(g). For consistency, this provision will be referred to as Rule 41(g) herein.

This provision, by its language, provides for a pre-indictment motion to suppress. However, the Supreme Court specifically determined that this language was not "a statutory expansion of the exclusionary rule." *United States v. Calandra*, 414 U.S. 338, 349 n.6, 94 S.Ct. 613, 621 n.6 (1974). The Advisory Committee Notes to the 1989 amendments confirm this:

> Rule 41(e) is not intended to deny the United States the use of evidence permitted by the fourth amendment and federal statutes, even if the evidence might have been unlawfully seized. (cites omitted). Thus, the exclusionary rule is preserved for judicial decisions.

The third change made by the 1989 amendment was to add the following sentence:

> "If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings."

This new language highlighted a new approach the courts were to take on these motions as explained by the Advisory Committee Notes for the 1989 Amendments:

> As amended, Rule 41(e) avoids an all or nothing approach whereby the government must either return records and make no copies or keep originals notwithstanding the hardship to their owner. The amended rule recognizes that reasonable accommodations might protect both

> the law enforcement interests of the United States and the property rights of property owners and holders. In many instances documents and records that are relevant to ongoing or contemplated investigations and prosecutions may be returned to their owner as long as the government preserves a copy for future use. In some circumstances, however, equitable considerations might justify an order requiring the government to return or destroy all copies of records that it has seized. See, e.g., *Paton v. La Prade*, 524 F.2d 862, 867-69 (3rd Cir. 1975). The amended rule contemplates judicial action that will respect both possessory and law enforcement interests.

The leading Ninth Circuit Court of Appeals decision on this issue is *Ramsden v. Unites States*, 2 F.3d 322 (9th Cir. 1993). In *Ramsden*, the court adopted the four-part test established in *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975), for determining whether to entertain a pre-indictment Rule 41(g) motion:

> 1) whether the government displayed a callous disregard to the constitutional rights of the movant;
> 2) whether the movant has an individual interest in and need for the property he wants returned;
> 3) whether the movant would be irreparably injured by denying return of the property; and

> 4) whether the movant has an adequate remedy at law for the redress of his grievances.

Ramsden, at 325.

In *Ramsden*, an arrest warrant was issued in California for Ramsden to be arrested and face charges in Great Britain. While arresting Ramsden in a hotel room, federal marshals observed papers on a desk and on the floor, as well as a suitcase and briefcase. They opened the suitcase and briefcase to look for weapons, finding instead more documents. Without seeking a warrant, the marshals seized the documents. *Ramsden*, at 323-24.

In Ramsden, the Court upheld the district judge's determination that the unexcused failure to obtain a search warrant was a callous disregard for Ramsden's constitutional rights. *Ramsden*, at 325. The Court went on to conclude that the "mere threat of prosecution is not sufficient to constitute irreparable harm." *Id.* at 326. The Court concluded Ramsden did not have an adequate remedy at law, because this Court cannot presume how the law enforcement conduct will be treated by courts in the United Kingdom. *Id.* Ultimately, the Court determined that the balance of the four *Richey* considerations tilted in Ramsden's favor and required the reaching of the merits of the motion. *Id.*

The critical issue in determining the merits was whether the Government's conduct was so reprehensible that it should be denied the opportunity to retain copies of the documents. *Id.* at 327. Citing the Advisory Committee Notes referred to above, the Court reversed the district judge's order which

precluded the Government from retaining copies of the documents. The Court determined that returning the originals to Ramsden and allowing the Government to retain copies of the documents was the most appropriate resolution of the balancing of the interests of the movant and the Government. *Id.*

The Fifth Circuit Court of Appeals also found the Advisory Committee Notes persuasive in overturning a district judge's order requiring the return and complete suppression of documentary evidence pursuant to Rule 41(g), *United States v. Search of Law Office, Residence and Storage Unit Alan Brown*, 341 F.3d 404 (5th Cir. 2003). There, a search warrant was served on an attorney's office, residence and storage units in connection with an investigation of income tax evasion by the attorney. In connection with the search, a taint team procedure was established similar to this case. *Id.*, at 407. Like this case, the attorney refused to participate in identifying privileged documents among those which were seized. Relying on the *Calandra* decision and the Advisory Committee Notes, the Fifth Circuit found that Brown had not established irreparable harm in his vague, unsubstantiated assertion that some of the documents were privileged, or damage to his reputation from being indicted. *Id.*, at 414-15.

In this case, the Government asserts that all four of the *Richey* factors are in the Government's favor and this Court should decline to entertain the motion for return of property. Trezza argues that callous disregard of movant's constitutional rights is the most important factor, and paradoxically, an evidentiary hearing must be held to determine how egregious Agent Watson's conduct was.

Such an evidentiary hearing is unnecessary, either on the merits or to determine callous disregard of constitutional rights. As the Advisory Committee Notes and the explicit language of the 1989 amendments makes clear there is absolutely no justification for an order divesting the Government of maintaining at least copies, if not the originals, of the documents seized. The decision in *Paton v. LaPrade*, 524 F.2d 862 (3rd Cir. 1975), cited in the committee note for the exception to this rule, involves a unique situation far different from this case. There, a high school student who inadvertently mailed a letter to a group being investigated by the FBI, sought to have her FBI file expunged. Importantly, in that case, the investigation of the student was closed and the Government ostensibly had no further use of the documents. The investigation of Trezza is ongoing, so the Government must be allowed to retain the documents that were seized.

Trezza has not complained that he needs original documents, as opposed to the copies he was given. In fact, it appears Trezza has sold his interest in the law firm.

The relief Trezza seeks is for the documents seized to be suppressed as evidence in any future prosecution against him. That is not an appropriate remedy under Rule 41(g). Even if the *Richey* balancing test favored Trezza, he would ultimately lose on the merits of the motion because the relief sought exceeds the clear language and intent of Rule 41(g).

Because there is no need for an evidentiary hearing, the subpoenas should be quashed and the issue of the disqualification of attorney Mesh and Markovich is premature.

Appendix D

For these reasons, it is the report and recommendation of this Court, that the District Judge, after his independent review of the record, enter an order to:

1. **DENY** the Motion For Return of Property, without prejudice.

2. **GRANT** the Motion to Quash Subpoenas and order the subpoenas, which were previously stayed, quashed.

3. **DENY** the Motion to Disqualify Attorney's Mesh and Markovich, without prejudice.

4. **ORDER** that this case is dismissed, without prejudice.

Pursuant to 28 U.S.C. § 636(b)(I)(B), the parties have ten (10) days from the date of this Report and Recommendation to file written objections to these findings and recommendations with the District Court. Any objections filed should be filed as CV06-00492-TUC-DCB.

The Evidentiary Hearing presently set before U.S. Magistrate Judge Charles R. Pyle, on ***FRIDAY, OCTOBER 6, 2006, AT 9:30 A.M.*** **IS VACATED.**

DATED this 21st day of September, 2006.

s/ Charles R. Pyle
CHARLES R. PYLE
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 23, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-16959

D.C. No. CV-06-492-DCB
District of Arizona,
Tucson

STEPHEN M. TREZZA,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

ORDER

Before: O'SCANNLAIN, GRABER and BEA, Circuit Judges.

Because this appeal was dismissed by the April 6, 2007 order of the motions panel, appellant's "petition for panel rehearing and suggestion for rehearing *en banc*" is construed as a motion for reconsideration and suggestion for

reconsideration *en banc* pursuant to Ninth Circuit Rule 27-10, rather than Federal Rules of Appellate Procedure 40.

The motion is denied because appellant has not demonstrated that the court overlooked or misunderstood any points of law or fact to warrant reconsideration. *See* 9th Cir. R. 27-10(a). We again reject the previously asserted argument that appellate jurisdiction exists under 28 U.S.C. § 1291 over district court rulings on motions for return of property when there is an ongoing grand jury investigation. *See Andersen v. United States*, 298 F.3d 804, 808 (9th Cir. 2002) ("In this circuit, rulings on motions for return of property are unappealable when there is an ongoing grand jury investigation."). We are not persuaded by the new argument that appellate jurisdiction exists in light of *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006).

The suggestion for reconsideration *en banc* is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed docket.

No. 07-247

In the Supreme Court of the United States

STEPHEN M. TREZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction over petitioner's appeal of the denial of his pre-indictment motion for return of property under Federal Rule of Criminal Procedure 41(g).

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In the Supreme Court of the United States

No. 07-247

STEPHEN M. TREZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the appeal for lack of jurisdiction (Pet. App. 1a) is unreported. The order of the district court denying petitioner's motion for return of property (Pet. App. 2a-11a) and the report and recommendation of the magistrate judge (Pet. App. 12a-21a) are also unreported.

JURISDICTION

The order of the court of appeals was entered on April 6, 2007. A motion for reconsideration was denied on May 23, 2007 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on August 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the District of Arizona denied petitioner's pre-indictment motion for return of property under Federal Rule of Criminal Procedure 41(g). Petitioner appealed, and the court of appeals dismissed the appeal for lack of appellate jurisdiction. Pet. App. 1a.

1. On November 2, 2005, a magistrate judge issued search warrants for petitioner's law office and for storage units used by his law office. The search warrants authorized the seizure of documents relevant to possible criminal tax violations. At the time of the searches and the filing of petitioner's motion for return of property, a federal grand jury was investigating petitioner for possible criminal violations. Pet. App. 1a, 2a, 12a, 23a.

The warrants were executed by a "taint team" in light of the possible presence of privileged materials.[1] Pursuant to procedures set out in the affidavit supporting the warrants, no documents were to be provided to the investigative team until a privilege review had been conducted. The taint team conducted that review and returned any privileged documents to petitioner. The taint team also provided petitioner with copies of all documents the government had seized in the search. Pet. App. 2a, 12a-13a, 14a.

2. On June 16, 2006, petitioner filed a motion for a hearing under *Franks* v. *Delaware*, 438 U.S. 154 (1978), and a motion for the return of property under Fed. R.

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[1] A taint team consists of lawyers and agents who are not involved in the underlying investigation and whose review of arguably privileged material is intended to prevent that material from reaching the prosecutors and investigators conducting the investigation. See *United States* v. *In re Search of Law Office, Residence, & Storage Unit Alan Brown*, 341 F.3d 404, 407 (5th Cir. 2003).

Crim. P. 41(g).[2] The court *sua sponte* dismissed the motion for the *Franks* hearing as premature and set a hearing date for the Rule 41(g) motion. Pet. App. 3a, 13a.

In connection with the Rule 41(g) motion, petitioner served the investigative agent and several other witnesses with subpoenas duces tecum, seeking to depose and to obtain documents from the witnesses. Petitioner also moved to disqualify Assistant United States Attorneys on the investigative and taint teams on the ground that they would have to be witnesses at an evidentiary hearing on the Rule 41(g) motion. Pet. App. 13a-14a.

The government agreed that the documents seized pursuant to the search warrants would not be turned over to the investigative team until the district court ruled on the motion. The government explained, however, that this would impede the investigation. The government noted in this regard that the statute of limitations would run on one of the tax years under investigation on April 15, 2007. Pet. App. 7a-8a & n.2, 12a-13a & n.1, 14a.

3. a. Petitioner's Motion for Return of Property was referred to a magistrate judge, who recommended that it be denied. See Pet. App. 12a-21a. The magistrate judge concluded that the relief petitioner sought—to have all originals and copies returned to him to ensure the government would not be able to use them—had no justification under the facts and circumstances of the

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[2] *Franks* permits a defendant in a criminal case to obtain an evidentiary hearing based on a "substantial preliminary showing" that a search warrant affidavit contained a "false statement [made] knowingly and intentionally, or with reckless disregard for the truth," if the "false statement is necessary to the finding of probable cause." 438 U.S. at 155-156.

case. See *id.* at 20a. In particular, he explained that petitioner "has not complained that he needs original documents, as opposed to the copies he was given," and, in fact, "it appears [petitioner] has sold his interest in the law firm." *Ibid.* Accordingly, the magistrate judge concluded, the relief that petitioner sought was to have the documents "suppressed as evidence in any future prosecution against him" and "[t]hat is not an appropriate remedy under Rule 41(g)." *Ibid.*; see also *id.* at 14a (relief sought "is tantamount to a pre-indictment motion to suppress").[3]

b. Following *de novo* consideration of the motion, the district court accepted and adopted the magistrate judge's recommendation. Pet. App. 2a-11a. The court concluded that none of the four factors considered in the Ninth Circuit to decide whether to exercise equitable jurisdiction to grant a motion for return of property favored petitioner. *Id.* at 6a-8a. Consistent with the conclusions of the magistrate judge, the district court found, among other things, that petitioner had "not express[ed] a need for access to any of the seized documents" and had made "no argument of irreparable harm related to not possessing the original documents." *Id.* at 7a. The district court also reiterated the magistrate judge's conclusion that petitioner's motion was effectively a pre-indictment motion to suppress and an attempt to obtain extraordinary, civil discovery in connection with a criminal investigation. *Id.* at 8a-9a.

4. Petitioner appealed, and the government moved to dismiss for lack of appellate jurisdiction. Relying on its holding in *Andersen* v. *United States*, 298 F.3d 804

[3] The magistrate judge noted as well that petitioner was attempting to use the Rule 41(g) motion as a vehicle to obtain extraordinary, civil discovery of the government's investigation. Pet. App. 14a.

(9th Cir. 2002), cert. denied, 538 U.S. 977 (2003), that "rulings on motions for return of property are unappealable when there is an ongoing grand jury investigation," *id.* at 808, the court of appeals granted the motion to dismiss. Pet. App. 1a.

The court subsequently denied petitioner's request for reconsideration and reconsideration en banc. The court reiterated that *Andersen*, *supra*, governed this case and rejected petitioner's new argument that dismissal was inconsistent with the court's decision in *United States* v. *Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006). Pet. App. 22a-23a.

ARGUMENT

Petitioner contends (Pet. 4-11) that the court of appeals erred in failing to treat the denial of his motion for return of property under Fed. R. Crim. P. 41(g) as a final order, and therefore immediately appealable under 28 U.S.C. 1291. The court of appeals correctly held that under this Court's decision in *DiBella* v. *United States*, 369 U.S. 121 (1962), it lacked appellate jurisdiction over the denial of petitioner's Rule 41(g) motion. Although there is a conflict among the courts of appeals as to whether a pending grand jury investigation qualifies as a "criminal prosecution *in esse*" for purposes of *DiBella*, the Court has declined to resolve that conflict on numerous occasions over the past three decades, and there is no reason for a different result here, where petitioner's motion falls within *DiBella*'s rule for the independent reason that it is an attempt to obtain the suppression of evidence by other means. Further review is therefore not warranted.

1. a. In *DiBella*, *supra*, the Court addressed whether, and under what circumstances, the denial of a pre-

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indictment motion for return of property is immediately reviewable under 28 U.S.C. 1291. In doing so, the Court emphasized the significant harms and risks of delay and abuse that immediate appeal of such motions would cause. See, *e.g.*, *DiBella*, 369 U.S. at 126 ("the delays and disruption attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law"); *id.* at 129 ("fortuity of a pre-indictment motion may make of appeal an instrument of harassment, jeopardizing by delay the availability of other essential evidence"). Moreover, the Court explained, a pre-indictment motion for return of property, no less than a motion filed after indictment, "presents an issue that is involved in and will be part of a criminal prosecution in process." *Id.* at 127; see also *ibid.* (disposition of motion "will necessarily determine the conduct of the trial and may vitally affect the result") (citation omitted); *id.* at 129 ("appellate intervention makes for truncated presentation of the issue of admissibility").

In light of these considerations, the Court held that the fact that a motion for a return of property is filed before indictment is not sufficient to make a court's "evidentiary ruling" on that motion an "independent proceeding" that results in a final judgment immediately subject to appeal. *DiBella*, 369 U.S. at 131. Instead, "[o]nly if the motion is solely for return of the property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." *Id.* at 131-132.

b. In this case, petitioner failed to meet either of the two *DiBella* prerequisites for treating the motion as a truly independent proceeding, and thus subject to imme-

diate appeal as a final order under Section 1291.[4] Petitioner's motion was not "solely for return of property." Rather than a "collateral attempt to retrieve property," petitioner's motion was instead plainly "an effort to suppress evidence in related criminal proceedings." *Sealed Appellant 1* v. *Sealed Appellee*, 199 F.3d 276, 278 (5th Cir. 2000) (internal quotation marks omitted). As the court below recognized, petitioner's motion was not directed to obtaining access to the seized documents; the government provided him with originals of the privileged documents and copies of everything else, and he did not contend this was inadequate to his needs. See, *e.g.*, Pet. App. 7a (Petitioner "does not express a need for access to any of the seized documents."); *id.* at 20a (Petitioner "has not complained that he needs original

[4] There is no merit to petitioner's contention (Pet. 5-7) that this case is not covered by *DiBella* because it was formally treated as a civil case with a different docket number. Although it is common to decide pre-indictment motions for return of property under separate, civil docket numbers, no court has apparently treated that fact as determinative. See, *e.g.*, *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156, 157 n.3 (2d Cir.), cert. denied, 456 U.S. 927 (1982). To the contrary, doing so would conflict with *DiBella*. One of the two cases decided in *DiBella* involved a motion brought in a different district (and circuit) than the district in which the indictment was returned. It thus necessarily had a separate docket number. See *DiBella*, 369 U.S. at 123. This Court, however, rejected the contention that it should "assign independence to the suppression order because [it was] rendered in a different district from that of trial." *Id.* at 132. Such a result would place form over substance and ignore "practicalities in the administration of criminal justice" and the "practical reason for denying [the Rule 41 motion] recognition" as an "independent proceeding[]." *Id.* at 129. Accordingly, the Court concluded that, although the motion was formally decided in a separate proceeding, "it accords most satisfactorily with sound administration of the Rules to treat such ruling as interlocutory." *Id.* at 133.

documents, as opposed to the copies he was given. In fact, it appears [he] has sold his interest in the law firm."). The motion instead sought to suppress the evidence seized in the search so that it could not be used against him in criminal proceedings. See, *e.g.*, *id.* at 20a ("The relief [petitioner] seeks is for the documents seized to be suppressed as evidence in any future prosecution against him."); C.A. E.R. 197 (acknowledging that "the relief [petitioner] seeks is an order from the Court requiring the Government to return all originals and copies of the documents seized and an order preventing the government from presenting any of the illegally seized material to the grand jury and precluding the government from obtaining an indictment of [petitioner]"). As the courts of appeals have consistently held, a request for relief of that character does not satisfy the *DiBella* requirement that the motion be "solely for the return of property." See, *e.g.*, *Sealed Appellant 1*, 199 F.3d at 278; *In re 949 Erie St., Racine, Wisc.*, 824 F.2d 538, 541 (7th Cir. 1987); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 895-896 (1st Cir.), cert. denied, 449 U.S. 891 (1980).[5]

Additionally, the court of appeals correctly held that where, as here, a grand jury investigation is under way, the motion is "tied to a criminal prosecution *in esse* against the movant." *DiBella*, 369 U.S. at 132. The concerns about the potential for abuse and delay that animated the rule adopted in *DiBella* are squarely presented by a grand jury investigation. As the Court explained in *DiBella*: "Presentations before a * * *

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[5] See also *Sealed Appellant 1*, 199 F.3d at 278 ("[T]he fact that Appellants are simultaneously seeking a suppression remedy under *Franks* strongly suggests that this motion is not intended solely or primarily for the mere return of property.").

grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train." *Id.* at 131 (citing *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940)). And the Court has long recognized the danger of undue interference with and delay in the grand jury process. See, *e.g.*, *Cobbledick*, 309 U.S. at 327 ("It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstruct ing the 'orderly progress' of investigation should no more be encouraged in one case than in the other."); see also *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974) (rejecting suppression remedy before grand jury because, *inter alia*, it "would delay and disrupt grand jury proceedings," and thereby "'assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws'") (quoting *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973)); *United States* v. *Regional Consulting Servs. for Econ. & Cmty. Dev., Inc*, 766 F.2d 870, 874 (4th Cir. 1985); *Church of Scientology* v. *United States*, 591 F.2d 533, 535-537 (9th Cir. 1979) ("The principle that runs through all of these authorities is that an ongoing criminal proceeding is not to be interrupted by an appeal from an order denying suppression of evidence that may be used in that proceeding."), cert. denied, 444 U.S. 1043 (1980).

2. As petitioner notes (Pet. 4-5), a conflict exists among the courts of appeals on the scope of the second *DiBella* factor—specifically, whether there is "a criminal prosecution *in esse*," *DiBella*, 369 U.S. at 132, when

a grand jury is investigating a movant, but charges have not yet been filed. The First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have held that it is.[6] The Sixth, Seventh, Eighth, and Tenth Circuits have adopted the contrary view.[7] That conflict, however, does not warrant review of this case.[8]

To begin, even if the issue otherwise warranted review, this case would not present a suitable vehicle for

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[6] See, *e.g.*, *Imperial Distributors*, 617 F.2d at 896 (1st Cir.); *Standard Drywall*, 668 F.2d at 158 (2d Cir.); *United States* v. *Furina*, 707 F.2d 82, 84 (3d Cir. 1988); *Regional Consulting*, 766 F.2d at 874 (4th Cir.); *Sealed Appellant 1*, 199 F.3d at 278 (5th Cir.); *Church of Scientology*, 591 F.2d at 535-537 (9th Cir.); *In re Grand Jury Proceedings (Berry)*, 730 F.2d 716, 717 (11th Cir. 1984) (per curiam).

[7] See, *e.g.*, *In re Warrant Dated Dec. 14, 1990 (Shapiro)*, 961 F.2d 1241, 1243 (6th Cir. 1992); *In re 949 Erie St., Racine, Wisc.*, 824 F.2d at 540-541 (7th Cir.); *In re Grand Jury Proceedings (Young)*, 716 F.2d 493, 496 (8th Cir. 1983); *First Nat'l Bank of Tulsa* v. *United States Dep't of Justice*, 865 F.2d 217, 221 (10th Cir. 1989).

[8] Petitioner also cites (Pet. 5) the D.C. Circuit's decision in *United States* v. *Rayburn House Office Bldg*, 497 F.3d 654 (2007), but the court's jurisdiction there was not based on the conclusion that a final order had been entered in a separate Rule 41 proceeding, as petitioner argues was the case here. Rather, the court concluded that Representative Jefferson could appeal because "[l]etting the district court's decision stand until after the Congressman's trial would, if the Congressman is correct, allow the Executive to review privileged material in violation of the Speech or Debate Clause." *Id.* at 659. Accordingly, the court held that "jurisdiction of the Congressman's appeal rests on the collateral order doctrine." *Id.* at 658. That rationale presupposes that the Rule 41 motion *was* tied to a criminal proceeding *in esse*, but nonetheless involved an appealable order because of Speech or Debate considerations. Indeed, with respect to material that was not privileged under that Clause, the D.C. Circuit held that the Congressman's Rule 41(g) motion was "not independent of the criminal prosecution against him," and, applying *DeBella*, declined to exercise appellate review. *Id.* at 665-666.

resolving the conflict. As the district court and the magistrate judge concluded (*e.g.*, Pet. App. 7a-9a, 14a-15a, 20a), petitioner's motion is not "solely for the return of property," but is instead plainly "an effort to suppress evidence in related criminal proceedings." *Sealed Appellant 1*, 199 F.3d at 278 (internal quotation marks omitted). As a result, even if a grand jury investigation is not part of a "criminal prosecution *in esse*," petitioner would still fail to satisfy the requirements of *DiBella*. See, *e.g.*, *Furina*, 707 F.2d at 84 (order not appealable even if no criminal prosecution *in esse*, because "[s]uppression of evidence is the primary aim of their motions, and that is enough under *DiBella* to require that * * * the appeal be dismissed"); see also, *e.g.*, *In re Warrant Dated Dec. 14, 1990 (Shapiro)*, 961 F.2d at 1243-1245 (rejecting argument that pending investigation satisfies the "*in esse*" prong, but dismissing for lack of appellate jurisdiction because motion was not "solely for the return of property"); *In re 949 Erie St., Racine, Wisc.*, 824 F.2d at 540-541 (same).

In any event, the conflict in the circuits on this issue has existed since at least the 1970s, if not earlier. See, *e.g.*, *Standard Drywall*, 668 F.2d at 158 (citing cases from the 1960s, 1970s, and 1980s). This Court has repeatedly declined to review that conflict. See, *e.g.*, *Andersen* v. *United States*, No. 02-1045, Pet. at 7-11, cert. denied, 538 U.S. 977 (2003); *Standard Drywall*, *supra*; *Imperial Distributors*, *supra*; *Church of Scientology*, *supra*. Especially in light of the fact that resolution of the conflict would not affect the outcome in this case, there is no reason for a different result here.

3. Finally, petitioner contends (Pet. 8-9) that the decision below conflicts with the Ninth Circuit's own decision in *United States* v. *Comprehensive Drug Test-*

ing, Inc., 473 F.3d 915 (9th Cir. 2006), exercising jurisdiction over a government appeal of a pre-indictment order suppressing evidence under Rule 41(g). This Court, however, does not sit to resolve asserted intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, petitioner's claim was considered and specifically rejected below, Pet. App. 23a, and there is no conflict. The court in *Comprehensive Drug Testing* did not provide any analysis of *DiBella*, let alone any analysis that conflicts with *Andersen* or the order here. Moreover, an appeal by the government of an order *granting* pre-indictment suppression of evidence, as occurred in *Comprehensive Drug Testing*, 473 F.3d at 919-920, raises different jurisdictional issues than the *denial* of a defendant's motion for return of property, as happened here. An order requiring the return of all originals and copies and barring any use of the evidence by the government is likely to be immediately appealable under the collateral-order doctrine and under 18 U.S.C. 3731 (2000 & Supp. V 2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-247

IN THE

Supreme Court of the United States

STEPHEN M. TREZZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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The government's response omits a material fact in its statement of this case. And, it compounds that omission by failing to respond to one of Petitioner Stephen M. Trezza's (Trezza's) primary arguments in his petition. Because of its material omissions, the government's response violates Rule 3.3 of the American Bar Association's (the ABA's) Model Rules of Professional Conduct regarding a lawyer's duty of candor to the court.

Specifically, the government omits in its response that, on October 16, 2006, District Judge David Bury entered a ***final judgment*** in this civil case. Rather, the government merely describes District Judge Bury's underlying order and omits the later final judgment. Resp. 4. The government's failure to correctly describe the factual and procedural background of this case is a material omission.

The government also failed, in any way, to respond to Trezza's argument, Pet. 5-7, that because this is a civil case and because a final judgment was entered, the final judgment rule of 28 U.S.C. § 1291 applies and required the Ninth Circuit to hear Trezza's appeal on its merits. Instead, the government mischaracterizes Trezza's argument at page 5 of its response:

> Petitioner contends (Pet. 4-11) that the court of appeals erred in failing to treat the denial of his motion for return of property under Fed. R. Crim. P. 41(g) as a final order, and therefore immediately appealable under 28 U.S.C. § 1291.

Trezza has never maintained that District Judge Bury merely entered a "final order." As the government knows, the words "order" and "judgment" have very specific–and distinct–meanings. Likewise, the government's suggestion

that Trezza's argument involves an "immediately appealable" order is a clear reference to the law regarding interlocutory appeals and the exceptions to the general rule that interlocutory appeals are not permissible.

This case does not involve a "final order." This case does not involve an interlocutory appeal. A final, civil judgment was entered by District Judge Bury. That judgment was immediately appealable.

Rule 3.3 of the ABA's Model Rules of Professional Conduct states that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." The comment to Rule 3.3 specifies that Rule 3.3 is designed to ensure that lawyers do not engage in conduct that "undermines the integrity of the adjudicative process" and a lawyer "must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

Here, the government's response omitted a material fact in the procedural history of this case. If one only read the government's response, the reader would believe that no final, civil judgment had been entered by the District Court.

The government's entire response is written as though no final, civil judgment was entered and the most significant part of the lower court record does not exist. The government's omission and subsequent argument based on that omission has the potential to mislead this Court about the real issue of this case.

Any ruling made by this Court in reliance on the arguments made in the government's response would

critically "undermine[] the integrity of the adjudicative process" in this case.

As Trezza consistently has argued, there is no authority that supports the conclusion that, in a civil case, a final judgment is not appealable. The government chose to ignore Trezza's argument and instead argued that *DiBella v. United States*, 369 U.S. 121 (1962), applies to prevent Trezza from appealing the "order" of the district court. *DiBella* does not apply. This is a civil case. *DiBella* was a criminal case. Here, a final, civil judgment was entered. No final judgment was entered in *DiBella*.

No amount of misleading analysis can change the simple facts of this case: This case is a civil case and was formally treated as a civil case—as the government admits at Resp. 7 n. 4. A ***final judgment*** was entered in this civil case. *See* Pet. App. C. Final judgments in civil cases are appealable. *See* 28 U.S.C. § 1291; *see also, e.g., Williamson v. UNUM Life Ins. Co. of America*, 160 F.3d 1247, 1249 (9th Cir. 1998) ("The final judgment rule, which is embodied in 28 U.S.C. § 1291, empowers circuit courts to hear appeals from ***all*** final judgments issued by the district courts.") (Emphasis added).

No case law or statute cited by the government contradicts, or even attempts to respond to any of the foregoing facts or law. None of the cases relied upon by the government, including *DiBella*, involved a final judgment in a civil case.

Contrary to the government's argument, this Court should resolve the split among the circuit courts of appeals regarding the meaning in *DiBella* that motions for return of property are independent and immediately appealable,

only if such a motion is "in no way tied to a criminal prosecution *in esse* against the movant." *DiBella*, 369 U.S. at 131-32.

Another reason for granting Trezza's petition involves the "taint team." As the government admits, a "taint team" was used during the execution of the search warrants in this case. Resp. 2. The "taint team," of fellow government investigators, reviewed seized material to determine if any privileged material was seized. After that review, some seized materials were returned to Trezza. The remaining documents then were forwarded to the investigative team. Both the investigative team and the "taint team" consisted of Internal Revenue Service (IRS) agents and Assistant United States Attorneys, all in the same Arizona offices.

The "taint team" procedure used by the government was illegal. The law is unsettled as to whether the "in-house" "taint team" used here is permissible or whether the procedure described by the Ninth Circuit in *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006), must be used. In *Comprehensive Drug Testing*, the Ninth Circuit found that, instead of a "taint team" procedure similar to that used here, the seized materials should have been submitted to a neutral magistrate for review, before being released to the government's investigators. A similar procedure was used in *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, 497 F.3d 654 (D.C. Cir. 2007), where materials seized from a sitting Congressman's office were reviewed by a "filter team" to determine whether they were privileged under the Speech and Debate Clause. *Id.* at 657. Those items found to be potentially privileged were then turned over to the district court for its review. The

D.C. Circuit found that the Speech and Debate Clause was violated by the Executive branch's review before turning over matters to the District Court. *See also United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995).

This Court should grant Trezza's petition for certiorari and find that jurisdiction exists for the Ninth Circuit to hear on its merits Trezza's appeal regarding the "taint team" procedure.

This is an important issue that both Trezza and the government have an interest in seeing resolved. The government is employing different methods in using "taint" or "filter" teams. The Ninth Circuit must address this issue so that the legality of such a procedure will be set for future use.

CONCLUSION

Trezza's petition for certiorari should be granted. This Court should rule that the Ninth Circuit erred in not permitting Trezza to appeal a final judgment in a civil case.

This Court should deem the government's failure to address Trezza's argument as a confession of error.

This Court also should grant Trezza's petition to resolve the split among the circuits regarding the appealability of denials of Rule 41(g), Fed. R. Crim. P., motions.

This Court should remand this appeal to the Ninth Circuit so that it can address Trezza's arguments regarding the use of the "taint team" procedure.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15(8), Rules of the Supreme Court, Petitioner Stephen M. Trezza (Trezza) files this Supplemental Brief to alert the Court to "intervening matter not available" at the time of Trezza's last filing. Specifically, Trezza calls the Court's attention to the Government's Petition for Certiorari in *United States of America v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, No. 07-816. In *Rayburn*, the government takes a position opposite to the position that the government has taken in this appeal.

Rayburn concerns the execution of a search warrant at the congressional office of Representative William J. Jefferson and whether the method by which that warrant was executed violated the Constitution's Speech or Debate Clause. *See* U.S. Const. Art. I, § 6, Cl. 1. Representative Jefferson filed a motion for return of property pursuant to Rule 41(g), Fed. R. Crim. P., requesting return of all seized documents protected by the Speech or Debate Clause. The District Court denied that motion and Representative Jefferson appealed to the D.C. Circuit. Importantly, and in contrast to Trezza's case, no final judgment was entered by the District Court in *Rayburn*. Moreover, while Representative Jefferson's appeal was pending in the D.C. Circuit, Representative Jefferson was indicted in the U.S. District Court for the Eastern District of Virginia. Indeed, Representative Jefferson already filed a motion to suppress based on many of the same issues in his Rule 41(g) motion that is the subject of the government's petition.

On appeal, the D.C. Circuit found that the execution of the search warrant did violate the Speech or Debate Clause and remanded the case to the District Court for a determination of which seized documents fell within the Speech or Debate Clause's scope and, therefore, had to be returned to Representative Jefferson. The government now petitions this Court to review and reverse the D.C. Circuit's decision.

The government's petition for certiorari in *Rayburn* is significant to Trezza's case because, by filing the petition, the government concedes that, despite the fact that Representative Jefferson has been indicted, and despite the fact that no final judgment was entered in *Rayburn* in the District Court, an appeal properly can be brought. The general rule regarding the appealability of denials of Rule 41(g) motions is that such appeals can be maintained only when the Rule 41(g) motion was "solely for the return of the property and is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella v. United States*, 369 U.S. 121, 131-32 (1962). Whether a grand jury investigation qualifies as a "criminal prosecution *in esse*" is one of the core issues of Trezza's appeal. However, it is generally accepted that the return of a criminal indictment, such as against Representative Jefferson, clearly qualifies as a "criminal prosecution *in esse*."

Here, the government admitted that Trezza's case is a civil case. And the government admits that a final civil judgment denying Trezza' Rule 41(g) motion was entered by the District Court. Furthermore, no indictment has been brought against Trezza, despite over two years having elapsed since the execution of the

search warrants at issue in Trezza's case. Despite these facts, the government claims in its Brief in Opposition that Trezza cannot maintain his appeal and the Ninth Circuit correctly determined that it lacked jurisdiction over Trezza's appeal.

The government cannot have it both ways. In *Rayburn*, the government is pursuing an appeal regarding the denial of a Rule 41(g) motion despite a criminal indictment and a lack of a final District Court judgment. With Trezza, the government is arguing that Trezza's appeal is not proper, yet no indictment has been brought against Trezza and a final, civil judgment was entered in the District Court.

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